Office-Supreme Court, U.S.
FILED
MAR 18 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1365

In the Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON, PETITIONER

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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QUESTIONS PRESENTED

1. Whether the relicensing of a hydroelectric project invariably constitutes a "major Federal action[] significantly affecting the quality of the * * * environment," within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), therefore always requiring the Federal Energy Regulatory Commission to prepare an Environmental Impact Statement before issuing a new license.

2. Whether Section 6 of the Federal Power Act, 16 U.S.C. 799, requires the Commission to consider and decide all fishery protection issues before it issues a license, rather than issuing, with the licensee's consent, a license with "open ended" conditions which authorize the Commission to insert additional fish protection measures upon the completion of an ongoing comprehensive study of all fish-related issues by the Commission.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

Respondent Federal Energy Regulatory Commission files this brief in support of the petition of the Public Utility District No. 1 of Chelan County, Washington for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals and as modified on rehearing (Pet. App. 1a-22a, 74a-75a) is reported at 746 F.2d 466. The orders of the Federal Energy Regulatory Commission (Pet. App. 23a-73a) are re-

ported at 15 F.E.R.C. ¶ 62,187 (May 13, 1981); 19 F.E.R.C. ¶ 61,223 (June 4, 1982); and 21 F.E.R.C. ¶ 61,264 (Nov. 23, 1982).

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1984. Petitions for rehearing were denied on October 30, 1984 (Pet. App. 74a-75a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act, 16 U.S.C. 791a *et seq.*, and the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, are set forth in Pet. App. 76a-78a, 78a-79a.

STATEMENT

In this case, the court of appeals set aside a new license issued to the original licensee by the Federal Energy Regulatory Commission on the ground that the Commission had failed to comply with governing statutory provisions. The questions raised by the petition challenge the correctness of that determination.

A. Statutory Structure

The Federal Energy Regulatory Commission (Commission or FERC) issues licenses under the Federal Power Act, 16 U.S.C. 791a *et seq.*, for the construction and operation of non-federal hydroelectric project works in the waters over which Congress has jurisdiction or on public land. Original licenses are valid for up to 50 years and contain conditions, both mandated by the statute and prescribed by the Commission, designed to regulate the project's operations. § 6, 16 U.S.C. 799. Section 6 further provides that

each license "shall be conditioned upon acceptance by the licensee of all the terms and conditions" of the Act "and such further conditions * * * as the Commission shall prescribe in conformity with [the Act]." After its issuance, the license "may be altered * * * only upon mutual agreement between the licensee and the Commission."

At the end of the term of the initial license, the Act gives the Commission several choices. The agency may either: (1) recommend to Congress federal takeover (except where, as here, a municipality is the original licensee); (2) issue a new license to the original licensee; (3) issue a new license to a new licensee; or (4) issue a nonpower license, withdrawing the project from power production altogether. §§ 14, 15, 16 U.S.C. 807, 808. The Commission has never issued a nonpower license. Until the Commission decides what course to follow on relicensing the agency may issue annual licenses to keep the project operating. An annual license must, however, contain the same terms as the expired license. *Ibid.*

B. The Proceedings Before The Commission

1. Petitioner, the Public Utility District No. 1 of Chelan County (Chelan), is the successor to the entity which, in January of 1930, obtained the license for the Rock Island Dam, one of six dams in the midsection of the Columbia River in Washington state. Towards the end of the Rock Island's 50-year license term, various fish and Indian interests petitioned the Commission to institute a proceeding aimed at modifying the operation of all six licensed dams, including Rock Island. The Commission granted the petition, *Public Utility District No. 2 of Grant County*, 6 F.E.R.C. ¶ 61,210 (Mar. 7, 1979). That proceeding resulted in the adoption of interim fish protection measures and the parties are now in ongoing pro-

ceedings, concentrating on developing permanent modifications. See 10 F.E.R.C. ¶ 61,257 (Mar. 20, 1980).[1]

In the meantime, in January 1980, Chelan's original license expired. After issuing two annual licenses, the Commission's delegate, the Director of the Office of Electric Power Regulation, issued a new 40-year license to Chelan. 15 F.E.R.C. ¶ 62,187 (May 13, 1981). On appeal, the Commission affirmed, 19 F.E.R.C. ¶ 61,233 (June 4, 1982), and thereafter denied rehearing, 21 F.E.R.C. ¶ 16,264 (Nov. 23, 1982).

2. In approving the issuance of the license to Chelan, the Commission first rejected the claim that the agency should not have relicensed the Rock Island Project because the Commission had not yet completed the Mid-Columbia case and had not fixed permanent fish conditions.

Rather, the Commission held that although the new license contained no long term fish protection measures, these matters were being considered in the Mid-Columbia proceeding and, in fact, the license incorporated the interim fish measures recommended in the Mid-Columbia proceeding. Moreover, because the license contained an "open ended" condition which had been accepted by Chelan at the time it accepted the license,[2] the Commission believed it was author-

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[1] An Administrative Law Judge of the Commission is currently conducting hearings to determine the type of fish protection devices to install on the Mid-Columbia dams and how the licensee should regulate the flow of the river to enable more fish to survive on their migrations to and from the Pacific. Meanwhile, the parties agreed on measures to improve the operation of the projects, excluding Rock Island, from the standpoint of fish protection.

[2] An "open ended condition" (termed a "reopener clause" by the court below, Pet. App. 13a) is a license article under

ized to amend the fish articles of the license at any time during its 40-year term when the Mid-Columbia proceeding was terminated and the final fish conditions were decided upon (Pet. App. 27a, 61a, 62a, 70a). 15 F.E.R.C. at 63,318; 19 F.E.R.C. at 61,438, 61,439; 21 F.E.R.C. at 61,733.

The Commission adopted this approach because these fish "problems demand a systemwide approach" and "open ended" conditions are designed "to implement any changes in project operation or structures that [the Commission] deem[s] necessary for the protection and enhancement of the fisheries resources when an adequate record has been certified to the Commission" (Pet. App. 61a). As the Commission further explained on rehearing, "in issuing new licenses for old projects, * * * we have often found it necessary to have the applicant and interested agencies conduct rather detailed fisheries studies of several years' duration" (*id.* at 70a). This is particularly important for (*id.* at 70a-71a (emphasis in original)):

> When there is only one applicant for the new license, it frequently makes sense to go ahead and issue the new license before the lengthy studies are complete, so as to put in effect sooner the new license conditions, which relate to *all* aspects of the project and in many cases strengthen the protection of other aspects of the public interest in the project.

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which the Commission reserves the right to change the operation of the project before the license expires.

The Commission in its order on appeal also rejected the assertion that relicensing could not go forward without an Environmental Impact Statement (EIS) as provided for by Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). On this aspect of the case, the Commission pointed out that an EIS is required only where the project sought to be licensed "significantly affects the quality of the environment" and that those seeking such a study here "ha[d] failed to identify any * * * impact caused by the issuance of the license" (Pet. App. 63a). The Commission noted further that (*ibid.*):

> The continuing impact of the project on the fisheries resource is being addressed in the separate proceeding. The license is adequately conditioned to provide for the protection of the environmental resources of the project area.

C. The Decision Of The Court Of Appeals

The Ninth Circuit reversed on both issues (Pet. App. 1a-22a, 74a-75a).

As to the Commission's obligations under NEPA, that court unequivocally held that an EIS is always "required prior to the decision to relicense the project" (Pet. App. 18a). The panel so ruled notwithstanding its recognition that the Rock Island Dam predated NEPA (except for a post-NEPA expansion for which the Commission had prepared an EIS, see Pet. App. 89a), and the fact that the court had found "no cases which have addressed this issue in the context of relicensing hydropower projects by FERC" (*id.* at 18a). The court also acknowledged that it

and other circuits had previously held that actions that were essentially phases of continuing activity, such as lease renewals of shipyards and parking lots and purchases of existing airports, do not require agencies to prepare EIS's under NEPA (Pet. App. 19a). The court sought to distinguish the situation here, however, on the grounds that "[r]elicensing is substantially equivalent to issuing an original license and one would assume" that NEPA applied (*id.* at 21a), and that a license renewal is "more akin to an irreversible and irretrievable commitment of a public resource than a mere continuation of the status quo" (*ibid.*). To further support this view, the court relied upon the fact that the Commission was obligated, before it issued a new license, to determine whether it should recommend federal takeover or a nonpower license. According to the court below, the takeover alternative, although not a realistic possibility in this case, is "a strong indication that FERC should have at its disposal all pertinent information, including that provided in an EIS" (*id.* at 20a).[3] Similarly, the court held, whether or not to issue a nonpower license "necessitate[s] the information prepared in an environmental impact statement" (*id.* at 21a).

The panel also reversed the Commission on the Section 6 issue. Starting from the premise that the relevant statutory scheme "require[s] FERC to examine fishery issues before issuance of a license" (Pet. App. 8a), at both the initial licensing stage and on relicensing (*id.* at 8a-10a), the panel concluded that

[3] The court subsequently amended its opinion, acknowledging that takeover was not a statutorily authorized alternative here since Chelan is a municipality. See 16 U.S.C. 828 (Pet. App. 75a).

FERC had failed to meet that statutory responsibility in this case. In the court's view, the Commission violated its statutory obligation to give "prelicensing consideration of fishery issues" (*id.* at 12a), by issuing a new license, with "open ended" conditions rather than deferring the issuance of a new license with permanent fish protection conditions, until those issues were fully resolved (*ibid.*). In the court's view, the Commission could in the meantime simply issue annual licenses to maintain the status quo (*ibid.*). According to the court "[n]o harm would accrue to the licensee, as annual licenses must incorporate the terms of the prior license" (*ibid.*).[4]

ARGUMENT

This case raises significant issues involving NEPA and the Federal Power Act directly affecting the Commission's proper exercise of its hydroelectric li-

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[4] The court of appeals reversed the Commission on two other grounds: the failure to require Chelan to file with its license application "Exhibit S," a report of the projected effect of the dam on fish (Pet. App. 15a-18a) and an alleged violation of the requirement to give "equal consideration" to fish under the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839b, and the Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.* (Pet. App. 14a-15a). However, both these holdings of the court fall if this Court upholds the Commission's view, that the "open ended" fish conditions it inserted in the new license adequately protect the interests in conservation of fish. Indeed, the court of appeals held that the Commission could not waive the filing of Exhibit S because the exhibit "is plainly designed to facilitate FERC's *duty* to consider fishery issues prior to licensing" (*id.* at 17a (emphasis in original)). Similarly, the court found that the Commission had violated the other statutes because it had failed to consider fish issues before issuing a license (*ibid.*).

censing responsibilities. In reversing the Commission by requiring an EIS for every relicensing, and appearing to restrict severely the use of "open ended" conditions in licenses, the court below has seriously hampered the Commission in effectively and promptly assuring the orderly development of hydroelectric projects. In these circumstances the court should grant the petition on both these issues.

1. a. An automatic rule that an EIS is required before the Commission may act on a new license application is not only legally unsound but would impose an enormous administrative burden on the Commission. Thus, over the last 64 years the Commission has licensed hundreds of projects each of which must, at some point, be considered for relicensing. Currently, there are 46 pending relicensing applications before the Commission, with another 241 licenses due to expire by the end of 1993. Overall, in the next 20 years, approximately 400 projects will be considered for renewal. Because each EIS requires, on the average, between one and two years to complete, the drain on the Commission's resources in preparing an EIS would be staggering without any correlative benefit to the environment if the view of the court below were to prevail. That view, moreover, finds no support in NEPA.

b. Section 102(2)(C) of NEPA, 42 U.S.C. 4332 (2)(C), requires that agencies prepare EIS's for "proposals for * * * major Federal actions" that significantly affect the environment. The statutory language does not define "proposal" or explain precisely what the threshold for an EIS is. However, the Conference Report indicates that Section 102 of NEPA was "based on section 102 of the Senate bill[,] [as] [t]here was no comparable provision in the

House [version]." H.R. Conf. Rep. 91-765, 91st Cong., 1st Sess. 8 (1969). The section-by-section analysis of the Senate bill explains that the requirements for an EIS attach when (115 Cong. Rec. 29085 (1969) (emphasis added)):

> Each agency * * * proposes *any major* actions, such as *project proposals*, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs * * *.

This congressional statement strongly implies that in the context of the Federal Power Act, NEPA requires an EIS for "project proposals," which involve construction or reconstruction or expansion of a dam, *i.e.*, some significant physical change, and does not apply to a situation where, as here, the "proposal," *i.e.*, the relicensing, involves no more than a determination as to who will operate the development for the next license term and under what conditions the dam will operate. There is no invariable rule that there will be a meaningful change at the expiration of a license term.

Indeed, up until this case, the courts have interpreted the EIS requirement as triggered only by some meaningful change in the status quo. For example, the Ninth Circuit itself pointed out in *San Francisco Tomorrow* v. *Romney*, 472 F.2d 1021, 1024 (1973):

> The Act does not by direct language or by implication call for retroactive application. In fact, the Council on Environmental Quality * * * states in its interim guidelines of April 23, 1971 that existing federal projects and programs are affected only by *further* major action, as follows:
>
> "11. Application of section 102(2)(C) procedure to existing projects and programs. To the maximum extent practicable the section 102

> (2)(C) procedure should be applied to *further* major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to the enactment of the Act on January 1, 1970. * * * (Emphasis added) 36 Fed. Register 7727."

Again, in *Sierra Club* v. *Hassel*, 636 F.2d 1095 (5th Cir. 1981), the court of appeals was faced with the situation in which a hurricane had destroyed a bridge and the federal government sought to rebuild it. The Sierra Club claimed that, in rebuilding the bridge, the government should have assumed the status quo to be the area in question without the bridge and thus should have prepared an EIS. The Fifth Circuit disagreed, and, citing the Ninth Circuit's opinion in *City & County of San Francisco* v. *United States*, 615 F.2d 498 (1980), held that even though the bridge no longer existed "it was not unreasonable * * * to conclude that the status of the environment to be considered was that with the bridge in place * * * [t]he reconstruction project will only restore an environmental situation that had existed for [many] years" (636 F.2d at 1099).

Indeed, the Ninth Circuit in that very case, *City & County of San Francisco*, also rejected a claim that before leasing a shipyard, the government should also have considered the possibility of using the area as a deep water port, with allegedly fewer detrimental consequences to the environment. The court held that "a central purpose" of the lease was to keep the shipyard in sufficient condition to enable the Navy to assume immediate control in a national emergency and that the lease included such provisions (615 F.2d at 501). In that context, the Ninth Circuit ruled that "[i]t was not unreasonable to regard the leasing * * *

as a phase in an essentially continuing activity * * * [and] the Navy * * * [need not conduct itself] as if [it] were * * * establish[ing] * * * [the facility] for the first time" (*ibid.*). Accord, *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1283 (1974).

Applying these principles here, the Commission correctly ruled that no EIS was mandated in this relicensing proceeding because the applicant proposed no changes in the project and, in any event, the only impact resulting from the the operation of Rock Island—the fish issue—was being resolved in a separate, ongoing proceeding conducted under the Federal Power Act.[5] As the Commission put it: "[w]e find that the environmental record already compiled is adequate to support our order issuing a new license * * * especially in light of our decision to include open-ended conditions pertaining to fisheries * * *" (Pet. App. 70a).

c. While the court below recognized that "viewed narrowly," relicensing represents a continuation of the status quo and, therefore, in that sense, the Com-

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[5] The fact that the Commission in this case is reviewing fish issues in the Mid-Columbia proceeding and on relicensing generally considers and inserts new fish protection measures does not mean that the agency must prepare an EIS on the matter. In relicensing cases, the Commission undertakes this responsibility under its Federal Power Act obligation to insert appropriate conditions in licenses without any special proceeding. § 15(a), 16 U.S.C. 808(a). On the other hand, under NEPA, the Commission must undertake an elaborate procedure involving preparation of a detailed comprehensive statement, notice and comment and public participation. *Friends of the River* v. *FERC*, 720 F.2d 93, 105-106 (D.C. Cir. 1983) (citing *Calvert Cliffs Coordinating Committee, Inc.* v. *United States Atomic Energy Commission*, 449 F.2d 1109, 1114 (D.C. Cir. 1971)).

mission's holding comported with the case law (Pet. App. 19a), it sought nevertheless to sustain its contrary ruling on the ground that relicensing is by definition something more. A principal rationale for the court's view was that "whether a non-power license is necessary necessitate[s] the information prepared in an environmental impact statement" (*id.* at 20a-21a). This analysis, however, rests on a slim reed, since it altogether misconceives the impact of the potential issuance of a nonpower license.

In the first place, there was not the slightest possibility that a nonpower license would issue in this case since Chelan was the only applicant on relicensing and no party requested such a result (Pet. App. 7a-8a). The court's argument is also flawed in a broader sense since the issuance of a nonpower license is of nothing more than historic interest in the current state of hydroelectric power development.

Congress first gave the Commission authority to issue nonpower licenses in the 1968 amendments to the Federal Power Act (Pub. L. No. 90-451, 82 Stat. 616 *et seq.*); the 1920 Act provided for recapture and relicensing as the only possible courses of action when a license expired. In requesting the grant of new authority to issue a nonpower license, the then Chairman of the Commission indicated that it was necessary because a licensee may wish to abandon the project or there is no longer any need for the project as a source of electricity. Similarly, other uses, such as water supply, would be superior to having the project continue to produce power. Letter from Lee C. White, Chairman, FPC, to Honorable John W. McCormack, Speaker of the U.S. House of Representatives (Aug. 28, 1967). In fact, the relicensing provision of the statute (§ 15(b), 16 U.S.C. 808(b)) incorporates that legislative purpose.

This notion, that hydroelectric projects might become expendable, comported with the general view at that time that "hydroelectric power promises to occupy a relatively small place in the world's supply of energy." *Udall* v. *FPC*, 387 U.S. 428, 446 (1967). In that setting, a nonpower license was meant to serve as a temporary measure in the transfer of a project from power production to a governmental or private entity for other uses. But that situation has never materialized and recently, hydroelectric power has assumed a vital role in meeting national energy needs. In fact, the Commission has never issued a nonpower license. And in light of the incentives Congress enacted for hydroelectric projects,[6] nonpower licensing is no longer a viable alternative. Indeed, in an era of increasing hydroelectric power, abandonment of existing projects is not a realistic eventuality.[7]

At bottom, in imposing a mandatory EIS requirement, the panel rested its view that an EIS was always required on relicensing on an ipse dixit—that relicensing is "more akin to an irreversible and irretrievable commitment of a public resource than a mere continuation of the status quo," and "is substan-

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[6] *E.g.*, Sections 213 and 210 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 823a and 824a-3, and the Energy Security Act, 16 U.S.C. 2705(d).

[7] Thus, the court's quotation (Pet. App. 21a) of the 1968 letter from Chairman White, that on relicensing the Commission must examine the "best use" of each project, from which the court concluded that a relicensing is the same as an original license proceeding, must be read in its proper context. For one thing, on initial licensing the Commission may deny authorization to construct the dam; on relicensing removal of a dam is unrealistic. Moreover, as noted (pages 13-14, *supra*), in 1968 the experts thought that projects could be put to better uses than power production.

tially equivalent to issuing an original license" (Pet. App. 21a).[8] To be sure, there may be instances where an EIS is a necessary prerequisite before issuing a new license or a license amendment during the license term. In fact, an EIS was prepared as to the Rock Island project involved here when Commission authorization for a new generator was granted in 1974 (Pet. App. 89a). But that is hardly enough to support the absolute and unyielding rule adopted by the court below.

c. In sum, the panel's NEPA ruling falls squarely within this Court's admonition in *Vermont Yankee* that, "[t]o make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 551 (1978) (citing *NRDC* v. *Morton*, 458 F.2d 827, 837-838 (D.C. Cir. 1972) (NEPA does not require agencies to consider "remote and speculative possibilities")). Here, as well, "to compel [the Commission] to formulate an EIS * * * would trivialize NEPA[]." *Committee for Auto Responsibility* v. *Solomon*, 603 F.2d 992, 1003 (D.C. Cir. 1979), cert. denied, 445 U.S. 915 (1980). As this Court recently stated in *Baltimore Gas & Electric Co.* v. *NRDC*, 462 U.S. 87, 100 (1983), "Congress did not enact NEPA * * * so that an agency would contemplate the environmental impact of an

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[8] This approach ignores the legislative history of the 1920 Act that the inquiry on relicensing is more limited than at the time of issuance of the original license. See, *e.g.*, 53 Cong. Rec. 3353 (1916) (statement of Sen. Norris). Indeed, this Court left open the issue in a related context in *Escondido Mutual Water Co.* v. *LaJolla Band*, No. 82-2056 (May 15, 1984), slip op. 13, 14 n.23.

action as an abstract exercise." But that is precisely what the court of appeals has required in this case.

2. The panel below also seriously erred in its ruling on the Section 6 issue, particularly because it is difficult to gauge the full scope of the court's ruling. Because its limits—if any—are not clear, the opinion below engenders uncertainty, and this uncertainty may have a broad and unjustified impact. Thus, of 125 licenses the Commission issues each year, approximately 100 contain "open ended" conditions, generally, as here, dealing with fish protection issues.

a. Section 6 imposes on the Commission the duty to "express[] in said license" all the "terms and conditions and the [licensee's] acceptance thereof." The statute further mandates that once the license is issued it may not be "altered * * * [except] upon mutual agreement between the licensee and the Commission." In precise language, therefore, Section 6 requires the Commission to state the rules and conditions under which the licensee will operate and the licensee must accept them before commencing operations, or else no license will be issued.

The legislative history fully supports the thrust of the plain language. It underscores that the purpose of Section 6 was to inform licensees at the outset as completely as possible what the situation would be during the entire term of the license. See, *Water Power: Hearings Before the House Comm. on Water Power*, 65th Cong., 2d Sess. 72-73 (1918) (statement of O.C. Merrill). An "open ended" condition, inserted at the outset of the license term, achieves that objective by notifying the investor that, sometime during the term of the license, the Commission will insert specific conditions for such matters as fish protection as those requirements become clear. Thereby, the

licensee's expectations, as of the time it accepts the license, are not upset.

Indeed, later congressional pronouncements put the validity of "open ended" conditions beyond question. In 1968, Congress considered an amendment to the Federal Power Act which would have permitted the Commission to review licenses during their term and modify project operations, if necessary. The House Interstate and Foreign Commerce Committee, however, deleted the provision as "unnecessary in light of the * * * Commission's power to insert so-called open-end[ed] conditions in hydroelectric power project licenses." H.R. Rep. 1643, 90th Cong., 2d Sess. 2 (1968). Later, in the floor debates, all the Congressmen who participated endorsed a letter from the Commission regarding its authority to impose "open ended" conditions.[9]

Manifestly, therefore, Congress was well aware of the Commission's view of its Section 6 power, and endorsed it.[10] As the Commission's letter to Congress

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[9] That letter stated that "[i]n recent years the Commission, aware that it is unable, at the time of license issuance, to solve all of the problems that subsequently may have to be met * * * has imposed * * * limited subject open-end[ed] conditions * * *. Typical * * * conditions related to water releases, joint use of project reservoirs and properties, * * * coordination of project operation * * * with other projects and power systems[,] and construction * * * of facilities for the conservation * * * of fish and wildlife * * *." 114 Cong. Rec. 21440-21441 (1968).

[10] Although the Congress that endorsed "open ended" conditions was not the one that enacted the Federal Power Act, this Court has held that while "the view of a later Congress does not establish definitively the meaning of an earlier enactment, * * * it does have persuasive value." *Bell* v. *New Jersey*, 461 U.S. 773, 784-785 (1983) (citing *Bowsher* v.

made clear, it could not at license time solve all the myriad problems attendant upon the operations of hydroelectric projects. Indeed, the solution to some questions, such as coordination with future projects, cannot be known at the time of the license's issuance. The power of the Commission to insert "open ended" conditions under Section 6 is thus particularly valuable where the Commission, as is often the case, cannot conduct extensive prelicensing studies. In such circumstances, the only way the Commission can effectively ascertain the impact of the project is to monitor its actual operation.[11]

These are the considerations which prompted the Commission's actions here. Thus, it issued the new license to Chelan incorporating conditions based on what at that time (1981) was the latest available data (*i.e.*, the interim Mid-Columbia settlement).[12]

Merck & Co., 460 U.S. 824, 837-838 n.12 (1983) (especially where, as here, Congress was considering an amendment to the original statute)).

[11] The Commission's interpretation of Section 6 is consistent, at least in principle, with the recently expressed view of the District of Columbia Circuit in *Pacific Gas & Electric Co.* v. *FERC*, 720 F.2d 78 (1983). As the court there stated (*id.* at 83-84):

> FERC's power * * * to reserve the right to require future alterations enables the Commission to accord section 6 the scope its terms indicate without unreasonably undermining the [Federal Power Act's] broader purpose * * *. FERC has discretion under section 6 to restrict license terms * * * and is also authorized * * to impose additional license conditions at its discretion.

[12] The panel's invocation of *Udall* v. *FPC*, 387 U.S. 428, 440 (1967) (Pet. App. 9a-10a), is therefore inapposite. In *Udall*, the Commission had not taken any evidence on whether federal development should occur or on the impact of a new dam

b. It may be said, however, that the petition should not be granted on the ground that the Ninth Circuit's opinion does not depart from these principles; that, in fact, the panel did not outlaw all "open ended" conditions, but only those which are not predicated upon a prelicensing consideration and evaluation (see, *e.g.*, Pet. App. 10a-12a). But if that is all the court below meant to hold, then it should have affirmed here since the Commission did consider the fish issues by basing its 1981 conditions on the best information then available.

Moreover, while reversing the Commission's use of its "open ended" conditioning power to make changes after a projected 10 year study, the court below (Pet. App. 13a) reaffirmed its precedent in *California* v. *FPC*, 345 F.2d 917 (9th Cir.), cert. denied, 382 U.S. 941 (1965), that the Federal Power Act permits the agency to incorporate a "reopener clause" to be invoked after 20 years. In so doing, the court gave no rationale for this distinction.[13] Nor, for that matter,

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on the river at issue (387 U.S. at 434 (these issues were "[un]explored in this record")). Here, the Commission was conducting the Mid-Columbia proceeding. *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966), cited by the court (Pet. App. 11a-12a) is also inapposite, since there the Commission had ignored and failed to require submission of relevant evidence. 354 F.2d at 620-624. No similar claim can be made here.

[13] The court's narrow reading of *California* flies in the face of the language in that case that "section 6 * * * must not be given a construction which is impracticable of application" and that where the Commission only knows at a later time the full needs of the public interest, the agency may apply a "reopener clause" (345 F.2d 924; see Pet. 18). The court's present distinction between that case and this one creates even

did the court indicate the time limit for permissible as opposed to invalid "open ended" conditioning clauses.

c. Furthermore, even if the court's holding were interpreted to mean that "open ended" conditions are proper only if the initial condition operates for a significant period of time, that ruling seriously hampers the Commission in its administration of the Federal Power Act. This is underscored by three recent cases, *City of New Martinsville*, 27 F.E.R.C. ¶ 61,359 (June 4, 1984); *Swanton Village*, 27 F.E.R.C. ¶ 62,181 (May 24, 1984); and *Potomac Edison Co.*, 27 F.E.R.C. ¶ 62,184 (May 24, 1984), in which the Commission issued licenses with "open ended" conditions where valid data necessary for imposing environmental protection measures would be available only after a study of the actual operation of the projects. Under even a narrow reading of the ruling of the court below this approach appears to be open to serious question: the Commission may either license projects in the hope that a licensee will subsequently agree to later changes, impose conditions based on theoretical guesswork without the best available data, or not issue a license at all. There is not the slightest evidence that Congress meant to so

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more confusion since it leaves unclear how complex and detailed the prelicensing evaluation must be to pass the court's test. Thus, in distinguishing the "open ended" condition found valid in its earlier decision in *California* v. *FPC*, *supra*, the court noted that there the license incorporated "[s]pecific fish protection measures," and all the reopener clause did was to offer the Commission "the right to modify *those* conditions after twenty years" (Pet. App. 13a (emphasis added)).

hamper the Commission in the exercise of its statutory authority.[14]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1985

I authorize the filing of this brief.

REX E. LEE
Solicitor General

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[14] Indeed, the court of appeals held that the Commission could not, without running afoul of Section 6, use a "reopener clause" to incorporate into the new license the interim fish measures in the Mid-Columbia proceeding and change them when Mid-Columbia became final (Pet. App. 14a). At the same time, the court held that the agency should have used the "reopener clause" in Chelan's expired license to substitute the then existing fish conditions with those of Mid-Columbia. The illogic of this position compounds the Commission's difficulty with the decision below.

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